PRAMOEDYA ANANTA TOER

v.

DATUK ABDUL AZIZ AHMAD

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-22-43-87]
27 JULY 1987

CIVIL PROCEDURE: *Summary judgment - Account and payment of amount found due upon taking of account - Order 43 r. 1(i) RHC 1980 - Claim for royalty equivalent to 10% of proceeds from sale of plaintiff's books - Whether defendant liable to render account and payment.*

LIMITATION: *Right of action accrued to recover debt - Person liable/accountable acknowledges claim or makes any payment thereof - Whether fresh accrual of action on date of acknowledgment or before that date.*

By the statement of claim, the plaintiff contended that the defendant published and distributed in Malaysia, the plaintiff's book entitled "Keluarga Gerilya" and a royalty equivalent to 10% of the proceeds from the sale of the books is due to the plaintiff.

The defendant by his amended statement of defence admitted that he did publish and distribute the book and that it was used as a standard text book for Malay literature in Malaysian schools. He also admitted 5 printings of the book, the last being in 1985. He further admitted that RM8,789 had been paid by him to the plaintiff but denied he was an accounting party. He contended that he had never entered into any agreement with the plaintiff and if there was such an agreement (which is denied) there was no consideration therefor. The RM8,789 was "paid to the plaintiff gratis". Alternatively, the defendant pleaded the Limitation Act.

The plaintiff applied to the High Court under O. 43 r. 1(i) of the Rules of the High Court 1980 and sought summary judgment for an account and payment of whatever amount that may be found due upon taking of such account.

Held:

[1] The defendant has not disclosed any *bona fide* defence to the claim. The defendant's letters of 20 July 1981 and 19 September 1985 made it clear beyond any argument that the defendant published the book on the basis that he would distribute it and pay a royalty to the plaintiff at the rate of 10% of the gross proceeds.

[2] Invocation of the Limitation Act is of no avail as s. 26 of the Limitation Act has application in this case. In each of those two letters aforesaid of the defendant he acknowledged the plaintiff's claim to an account. In fact by those letters the defendant purports to render accounts to the plaintiff. Accordingly, there was a fresh accrual of the action on the date of each such acknowledgment. The Limitation defence fails.

[3] There was no *bona fide* preliminary question to be tried. It is clear that the defendant must render an account of the books printed in each of the printings and sold and the price at which the books were sold. It is quite clear that the defendant has to pay a royalty to the plaintiff at the rate of 10% of the gross proceeds of sale. Accordingly, there will be an order in terms of the application.

[Order in terms of application.]

Legislation referred to:
Limitation Act 1953, s. 26(2)
Rules of the High Court 1980, O. 43 r. 1(i)

For the plaintiff - Cyrus Das (P.H. Yeo with him); M/s. Shook Lin & Bok
For the defendant - K. Thavanesan; M/s. Syed Ibrahim & Co.

JUDGMENT

VC George J:

The plaintiff is an elderly Indonesian writer who lives in Indonesia and sues by an attorney. The defendant is a publisher who resides in Kuala Lumpur. It is common ground that the defendant had published one of the plaintiff's books entitled "Keluarga Gerilya" which apparently is widely read in Malaysia and is used as a text book for Malay Literature in the upper forms in Malaysian schools.

The plaintiff contends by the statement of claim that the defendant published and distributed the book in Malaysia and a royalty equivalent to 10% of the proceeds from the sale of the books is due to the plaintiff. The plaintiff seeks an account from the defendant in respect of the various printings of the book, the quantities printed and sold and of the proceeds received and consequential thereto payment of any sums determined as being due from the defendant less the sum of RM8,789 being the aggregate of the amounts that the defendant had previously intermittently paid to the plaintiff.

The defendant filed a statement of defence which later was amended. He admits that he did publish and distribute the book and that it is used as a standard text book for Malay literature in Malaysian schools. He also admits 5 printings of the book, the last being in 1985. He also admits that RM8,789 had been paid by him to the plaintiff but denies he is an accounting party. He contends that he had never entered into any agreement with the plaintiff and if there was such an agreement (which is denied) there was no consideration therefor. The RM8,789 was "paid to the plaintiff gratis".

Alternatively the defendant pleads the Limitation Act.

The plaintiff moved the Court under O. 43 r. 1(i) of the Rules of the High Court and sought summary judgment for an account and payment of whatever amount that may be found due upon taking of such account. The application was supported by an affidavit by the attorney of the plaintiff. By the affidavit the deponent exhibits a letter dated 20 July 1981 written by the defendant to the wife of the plaintiff by which letter the defendant is seen to render an account in respect of the various printings of the book, the price at which the books were sold and the number of books sold and the amounts received as a result of the sale. The defendant goes on to state in the letter as follows (as translated):

> The total which NY (that is the plaintiff's wife) should receive is RM7440 and the money which we have paid is RM7468 which means that payment for the first, second and third printings has been completed.
>
> The fourth printing is being distributed and till now 2958 copies have been sold at a price of RM7.

The deponent exhibited another letter dated 18 September 1985 written by the defendant, this time to the plaintiff himself in which reference is made to a letter dated 20 July 1985 but from what is further written in the letter it is obvious that there was a typing error and he in fact was referring to the said letter of 20 July 1981. Reference is made to the 4th printing and

of the said 2958 copies and he promised to settle the royalties due on those copies when he next visited Jakarta. Encik Thavanesan of Counsel for the defendant had urged me to ignore this affidavit as the deponent had not stated therein that the facts stated in the affidavit were stated out of his own knowledge or if based on information had not disclosed that fact nor the source of information. While there is merit in Encik Thavanesan's argument, the fact remains that what the plaintiff was really doing in moving the Court under O. 43 r. 1 was to rest his case on the contents of the said 2 letters by the defendant. Particularly as the defendant admits that those letters were written by him, although there is merit in Encik Thavanesan's objections I am of the opinion that I could and should read those 2 letters as being written and sent by the defendant.

There is an affidavit in reply by the defendant. He says that he had been dealing with the plaintiff through one Zubir Osman who had brought with him a letter of authority from the plaintiff authorising the publication of the plaintiff's book in Malaysia. He went on to say that he undertook publication of the book "not on a commercial arrangement but more on humanitarian grounds".

He goes on to say in his affidavit at para. 9:

> In any event as far as what the plaintiff requires I have already obliged the plaintiff and disclosed the particulars as contained in my letter of 20 July 1981 and also 19 September 1985 concerning the statement on the publication. And the two letters are annexed to the Affidavit of Hassan Abdul Karim ...

The defendant goes on to say that he had no concluded agreement with the plaintiff and that legally he is not accountable to the plaintiff.

In my judgment, the defendant has not disclosed any *bona fide* defence to the claim. The defendant's letters of 20 July 1981 and 19 September 1985 make it clear beyond any argument that the defendant published the book on the basis that he would distribute it and pay a royalty to the plaintiff at the rate of 10% of the gross proceeds.

Invocation of the Limitation Act is of no avail as s. 26 of the Limitation Act has application in this case. Section 26(2) is as follows:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim ... and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment of the last payment.

In each of those 2 letters of the defendant he acknowledges the plaintiff's claim to an account. In fact by those letters the defendant purports to render accounts to the plaintiff. Accordingly there is a fresh accrual of the action on the date of each such acknowledgment. The limitation defence fails.

In my judgment there is no *bona fide* preliminary question to be tried.

It is clear that the defendant must render an account of the books printed in each of the printings and sold and the price at which the books were sold. It is quite clear that the defendant has to pay royalty to the plaintiff at the rate of 10% of the gross proceeds of sale. Accordingly there will be an order in terms of encl. (5).

Also found at [1987] 2 CLJ 451